



Defendant-Appellant Hakim Kamau (“Kamau”) appeals from his conviction after a jury trial of child molestation, a Class A felony. Ind. Code §35-42-4-3.

The State charged Kamau with three counts of child molestation, and two counts of sexual misconduct with a minor, based upon his conduct with his stepdaughter, A.S. The State also alleged that Kamau was a habitual offender. Kamau’s jury trial began on June 7, 2006. At the conclusion of the trial, the jury found Kamau guilty as charged. On June 27, 2006, the bench trial on the habitual offender count was held. The trial judge found Kamau to be a habitual offender.

Kamau’s sentencing hearing was held on June 27, 2006. The trial court merged two of Kamau’s convictions for child molestation with one of Kamau’s convictions for sexual misconduct with a minor. The trial judge imposed a forty-year sentence for molestation and enhanced that sentence by thirty years for Kamau’s habitual offender status. The aggregate sentence was seventy years. The trial judge imposed a thirty-year conviction for Kamau’s remaining child molestation conviction, and ten years for the remaining sexual misconduct with a minor conviction, which were to be served concurrently with Kamau’s seventy-year sentence.

In this appeal, Kamau first attacks the sufficiency of the evidence establishing his guilt of Class A felony child molestation. He argues that A.S. never testified with specificity about an act of oral sex occurring while she was thirteen years old. He attacks the sufficiency of the evidence of her age, thirteen.

When reviewing a claim that a conviction is not supported by sufficient evidence establishing the defendant's guilt, this court may not reweigh the evidence or question the

credibility of witnesses. *Weis v. State*, 825 N.E.2d 896, 905 (Ind. Ct. App. 2005). The conviction must be affirmed if the finder-of-fact heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt. *Id.* When making this determination, this court considers only the evidence, and all reasonable inferences to be drawn from that evidence, favorable to the judgment. *Id.*

To sustain a conviction for child molesting as a Class A felony, the State is required to show that: Kamau, being over twenty-one years old; (2) with, A.S., a child under fourteen (14) years of age; (3) performed or submitted to sexual intercourse or deviate sexual conduct. Ind. Code §35-42-4-3. Again, the only element being challenged here on appeal is A.S.'s age.

During direct examination of A.S., the State asked her what else Kamau had done to her. She testified as follows:

[A.S.] He gave me oral sex.

[Prosecutor] Well, I want you to think when that first happened. How old were you when it happened.

[A.S.] 13.

Tr. 34-35. A.S.'s subsequent testimony is confusing. In fact, she goes on to describe another occasion where Kamau engaged in oral sex with her when she was fourteen years old. However, A.S. unequivocally stated that she was thirteen years old when Kamau first engaged in oral sex with her. She was thoroughly cross-examined about her testimony. Although the questions and answers that immediately follow the questions and answers set out above are confusing, there is sufficient evidence to sustain the jury's decision that Kamau was guilty of Class A felony child molesting.

Kamau next argues that the trial judge abused his discretion when he allowed certain testimony from A.S.'s mother. Kamau argues that the testimony was inadmissible pursuant to Ind. Rule of Evidence 404(b).

The admission of evidence is left to the sound discretion of the trial court, and that decision will not be reversed except for an abuse of that discretion. *Weis*, 825 N.E.2d at 900. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

The trial judge allowed A.S.'s mother, Paula, to testify about an incident where she observed Kamau sleeping on the floor of A.S.'s room while wearing a burgundy colored robe. Kamau claims that admission of that testimony violated Evid. Rule 404(b).

Evid. Rule 404(b) provides as follows:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Our supreme court has stated that Evid. Rule 404(b) is designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so called "forbidden inference." *Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997). A trial court faced with a 404(b) question must: (1) decide if the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to

commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *Id.* at 219.

The State correctly points out that the challenged evidence is not the type of evidence subject to exclusion under Evid. Rule 404(b). The testimony describing Kamau sleeping on the floor of A.S.'s bedroom while wearing his burgundy robe, is not evidence of a prior bad act. It is corroborative of A.S.'s testimony. This is not character evidence based on uncharged misconduct which is what Evid. Rule 404(b) is designed to exclude. The trial judge did not abuse his discretion.

Affirmed.

DARDEN, J., concurs.

SULLIVAN, J., concurring in result with separate opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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HAKIM KAMAU,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0607-CR-601
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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**SULLIVAN, Judge, concurring in result**

In this case the trial court did not merely decline to impose a sentence as to the jury verdicts upon Counts IV and V. Rather, the trial court actually entered judgments of conviction upon those counts and then purported to “merge” Count IV with the conviction upon Count II and “merge” the conviction upon Count V with the conviction upon Count III. With all due respect, I do not view the trial court’s so-called “merger” as adequate under the circumstances. The judgments of conviction on Counts IV and V should be vacated. Carter v. State, 750 N.E.2d 778, 780 (Ind. 2001); Collins v. State, 822 N.E.2d 214, 217 n.5 (Ind. Ct. App. 2005), trans denied; Jones v. State, 807 N.E.2d 58, 67-68 (Ind. Ct. App. 2004), trans. denied; Kochersperger v. State, 725 N.E.2d 918, 925-26 (Ind. Ct. App. 2000); Spry v. State, 720 N.E.2d 1167, 1170 (Ind. Ct. App. 1999), trans denied.

I otherwise fully concur in the majority memorandum decision.